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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

WILLIAM A. KROLL,

Petitioner,

vs.

BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, AN ILLINOIS PUBLIC CORPORATION,

Defendant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S RESPONSE TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Pursuant to Supreme Court Rule 15.6, Petitioner files this Petitioner's Response to Respondent's Brief in Opposition to Petitioner for Writ of Certiorari as to the arguments

raised by Respondent in their brief in opposition to the Petition for Writ of Certiorari.

1. THE RESPONDENT OVERLOOKS THE THRESHOLD ISSUE OF THE COURT OF APPEALS' DECISION IN THE RETROACTIVE APPLICATION OF THE ELEVENTH AMENDMENT TO A PENDING SUIT.

The Court of Appeals held waiver as the only possible grounds for denial of Eleventh Amendment immunity in the instant case. The court found no such waiver in the statute merging the University of Illinois Athletic Association with the University's Board of Trustees. This focus ignored fundamental constitutional and state law limitations on the exercise of Eleventh Amendment immunity. Namely, application of the Eleventh Amendment in this case violates Article III, section 2 and the Fourteenth Amendment of the Constitution of the United States, and

relevant Illinois canons of statutory construction.

Article III, section 2 of the Constitution confers federal court jurisdiction to all cases arising in diversity or under federal law. The Supreme Court's refusal to recognize state sovereign immunity in federal court spawned the Eleventh Amendment. See Chisolm v. Georgia, 2 U.S. 419 (1793). Barring federal jurisdiction over suits against states by individuals, other states and countries, the amendment incorporated state sovereign immunity into the balance of state and federal power.

The Eleventh Amendment took a discrete bite from the federal judiciary's Article III powers, delimited by the common law doctrine of sovereign immunity. The state crosses this boundary in petitioner's case, trying to confer Eleventh Amendment immunity on a

private entity. At the time Petitioner filed his suit, Respondent Athletic Association was an Illinois not-for-profit corporation, fully liable for its tortious acts. Now, with Petitioner's suit pending, the state tries, by merger, to cloak this private entity with the Eleventh Amendment. Unlike prospective application of the Eleventh Amendment, where a state exercises immunity already ceded, here the state tries to create immunity where none previously existed.

The idea that a state can wrest cases from the federal courts, shielding its own corporations from federal jurisdiction is wholly inconsistent with the rationale of the Eleventh Amendment. The Court of Appeals' interpretation of the amendment allows states to curtail federal jurisdiction at will. Article III, section 2 of the Constitution allows Congress alone to alter the

jurisdiction of the federal courts. Even Congress must follow neutral principals when doing so. United States v. Klein, 80 U.S. 128 (1872). It may not withdraw jurisdiction as a means of deciding cases.

A grant of Eleventh Amendment immunity in this case also infringes on Congressional Fourteenth Amendment powers. Petitioner has brought suit under 42 U.S.C., Section 1983, legislation passed pursuant to powers granted Congress by section 5 of the Fourteenth Amendment. That section gives Congress the prerogative to pierce a state's Eleventh Amendment immunity. In enacting Section 1983, Congress did not exercise this prerogative. Quern v. Jordan, 440 U.S. 332, 341 (1979). A state can bar federal jurisdiction of a Section 1983 suit against it. No such immunity obtains for individuals or entities outside the bounds of state agency. See Mt.

Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977). Respondent Athletic Association falls within this category. The state, by merger, would transform its actions into state action protected by the Eleventh Amendment. Just as a state could not convert the individual acts of a natural person to state action, neither can it subsume the acts of the corporate person.

The Court of Appeals overlooked relevant principles of Illinois state law, as incorporated by the Erie doctrine. Erie R.R. v. Tompkins, 306 U.S. 64 (1938). The question of whether a state could retroactively confer Eleventh Amendment immunity on a private entity by merger is one of federal law--interpreting what the Constitution allows. The question of interpreting the merger act, however, and deciding whether it actually did

confer such immunity on the Athletic Association, is one of state law. See, e.g. United States vs. Hawaii, 832 F.2d 1116 (9th Cir.1987) (court applies state law in deciding retroactively of amendment to state sovereign immunity statute).

Illinois law presumes prospective construction of statutes. Courts will apply a statute retroactively only on express instructions from the legislature. People ex rel. Manczak v. Carpentier, 3 Ill.2d 556, 121 N.E.2d 762 (1954). Legislative enactments with solely procedural effect are the exception to this rule--courts apply them retroactively absent a saving clause. Niven v. Siqueira, 487 N.E.2d 937, 109 Ill.2d 357, 94 Ill.Dec. 60 (1985); Ogdon v. Gianakos, 415 Ill. 591, 114 N.E.2d 686 (1953). Procedure, "embraces 'pleading, evidence and practice. Practice means those legal rules which direct

the course of proceedings to bring parties into court and the course of the court after they are brought in.'" Rivard v. Chicago Fire Fighters Union, 122 Ill.2d 303, 310, 119 Ill.Dec. 336, 340, 522 N.E.2d 1195, 1199 (1988) (quoting Ogdon v. Gianakos. 415 Ill. at 596, 114 N.E.2d at 689). Substantive law, "establishes the rights whose invasion may be redressed through a particular procedure." Id. When the operation of a procedural rule affects the assertion of a substantive right or destroys the right, retroactive application is inappropriate. Moore v. Jackson Park Hospital, 95 Il.2d 223, 69 Ill.Dec. 191, 447 N.E.2d 408 (1983); Hogan v. Bleeker, 29 Ill.2d 223, 193 N.E.2d 844 (1963).

If the merger statute affects substantive a well as procedural rights, retroactive application should not be presumed. A clear legislative indication of retroactive intent

should apply only if it does not violate constitutional or state law vested rights. In re Marriage of Semmler, 107 Ill.2d 130, 481 N.E.2d 716, 89 Ill.Dec. 873 (1985). If the merger statute had purely procedural effect, its waiver provision could still maintain prospectivity. The Court of Appeals ignored this hierarchy. It assumed the merger statute retroactive as to Eleventh Amendment immunity, absent a waiver provision. The court then analyzed the statute's waiver provision by the standard of Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985), finding it deficient. Moreover, by enabling the consolidation of two entities, the statute clearly has substantive effects--transfer of the pre-existing liabilities and obligations of the Athletic Association to the surviving corporation among them. As substantive law, the merger statute merited a presumption of

prospectivity.

Retroactive application of the merger statute also violates Illinois law by interfering with the exercise of a vested right. The Court of Appeals construed the merger statute's waiver provision as a consent to state, but not federal, suit. This allowed the court to characterize Petitioner's case in purely jurisdictional terms. Consignment to state fora would not trammel any vested rights. Yet, the opinion's final footnote reveals a fallacy in this reasoning. It points out that, "a state agency with eleventh amendment immunity...is not a 'person' within the meaning of section 1983," according to the Supreme Court's holding in Will v. Michigan Dep't. of State Police, 491 U.S. 58 (1989). Thus, retroactive application of the merger act would make Section 1983 unavailable to Plaintiff, disabling the right to seek damages

for infringement of constitutional rights. Remaining state causes of action could not remedy this right.

Illinois law recognizes a vested right in accrued tort causes of action. Moore v. Jackson Park Hospital, 95 Ill.2d 223, 69 Ill.Dec. 191, 447 N.E.2d 408 (1983) (no retroactive application of statute of limitations amendment that would instantaneously bar plaintiff's suit); Rivard v. Chicago Fire Fighters Union, 122 Ill.2d 303, 119 Ill.Dec. 336, 522 N.E.2d 1195 (1988) (no retroactive application of legislation making unincorporated associations amenable to suit). Each particular cause of action in a Plaintiff's claim constitutes a vested right. Balzer v. Inland Steel Co., 100 Ill.App.3d 1071, 56 Ill.Dec. 594, 427 N.E.2d 999 (1st Dist. 1981) (retroactive application of a statute of repose which would have barred

plaintiff's strict product liability cause of action refused, despite continued availability of negligence action). See also, Hupp v. Gray, 73 Ill.2d 78, 83, 22 Ill.Dec. 513, 516, 382 N.E.2d 1211, 1214 (1978).

Barring an accrued tort cause of action may also violate federal due process guarantees. See, e.g., Hartford Fire Insurance Co. v. Lawrence, Dykes, Goodenberger, Bower & Clancy, 740 F.2d 1362, 1367 (6th Cir. 1984); Edwardsen v. Morton, 369 F.Sup. 1359 (D.D.C. 1973). Other authority has held that no right vests until final judgement. See, e.g. Daylo v. Administrator of Veterans Affairs, 501 F.2d 811, 818 (D.C.Cir.1974); Seese v. Bethlehem Steel Co., 168 F.2d 58 (4th Cir.1948).

2. THE STATE'S ATTEMPT TO RETROACTIVELY CONFER ELEVENTH IMMUNITY ON THE ATHLETIC ASSOCIATION REPRESENTS IMPORTANT QUESTIONS OF FEDERAL LAW

Respondent cites the "unique" fact

situation of this case as grounds for denial of certiorari. The argument cut no ice--any case has unique facts. The breadth and import of its issues are what matters.

The Court of Appeals' interpretation of the Eleventh Amendment impermissibly alters the potential liabilities of private corporations. By the court's holding, a state could merge with any corporation and interpose Eleventh Amendment immunity for any crime, tort or breach of contract. The merger statute waiver provision's close tracking of the Illinois Not-For-Profit Corporation Act and the Illinois Business Corporation Act, underscores this view. A precedent which so alters the balance of state and federal powers merits Supreme Court review.

The Court of Appeals wrote in dictum that retroactive application of the merger statute completely barred Plaintiff's suit. This

presents the issue of whether the Constitution permits a state to deprive an individual of an accrued federal cause of action. It also raises the broader question of whether Due Process confers a vested right in an accrued tort cause of action.

These are constitutional issues of broad significance. In addition, Respondent believes granting certiorari could pose another constitutional question: whether the indicia of a state actor under the Fourteenth and Eleventh Amendments are identical.

3. THE DECISION OF THE COURT OF APPEALS IS INCONSISTENT WITH THE PRECEDENTS OF THIS COURT.

As noted above, the Court of Appeals retroactive application of the Eleventh Amendment contravenes precedent as to the balance of state and federal power, and the Erie doctrine. Even if correct in its finding of retroactivity, the Court of Appeals

overlooked both plain meaning and case interpretation of the merger statute's waiver provision.

The seventh circuit found the merger statute's waiver provision no more compelling than those rejected in Port Authority Trans-Hudson Corporation v. Feeney, 110 S.Ct. 1868 (1990), and Atascadero. Yet, the merger statute's waiver has a procedural aspect its counterparts in those cases lacked. The provision in Port Authority consented "'to suits, actions, or proceedings of any form or nature in law equity or otherwise.'" 110 S.Ct. at 1873. This passage created rights, but did not address the method for their enforcement. The merger statute provision, by contrast, explicitly preserves extant procedures, allowing prosecution "to judgment" of a pending proceeding "as if such merger had not taken place". Despite the Court of

Appeals' holding, the passage avails no other reasonable construction. It allows Petitioner's suit to continue in federal court.

The relevant case law confirms this proposition. The waiver provision tracks the Illinois Not-For-Profit Corporation Act of 1986's section on liability following merger, and its counterpart in Illinois' version of the Model Business Corporation Act. Ill.Rev.Stat., ch. 32, par. 111.50 (1986); Ill.Rev.Stat., ch. 32, par. 11.50 (1983). The section has its antecedents in this common law. See People vs. Dunleith Bridge Co., 322, Ill. 98, 118, 152 N.E.2d 526, 538 (1926).

Cases interpreting section 11.50 of the Illinois Business Corporation Act have found no exceptions to its "any claim existing" language. Krull v. Celotex Corp., 611 F.Supp. 146, 148 (N.D. Ill.1985) (punitive damages

allowed against successor to asbestos manufacturer allowed--"the surviving corporation stands in the shoes of the disappearing corporation in every respect"); Board of Education v. Herzog Bldg. Corp., 41 Ill.App.2d 44, 190 N.E.2d 152 (1st Dist.1963).

In addition to specifically authorizing the merger of the Board and the Athletic Association, the merger statute contained a more general provision authorizing merger of any state university with its athletic association. This otherwise identical section was inserted into Article 11 of the Illinois Not-for-Profit Corporation Act. This shows legislative intent that the Act should apply to the surviving "body corporate and politic". The legislature recognized that the Act would govern the merged entity. Hence, at the time it authorized the merger, the legislature amended section 111.50 of the Illinois Not-

for-Profit Corporation Act: "(c) Such surviving or new corporation has all the rights, privileges, immunities, and powers and is subject to all the duties and liabilities of a corporation organized under this Act; however, this subsection (c) does not apply to a surviving corporation which manages and governs a State university." (amendment underlined) Ill.Rev.Stat., ch. 32, par. 111.50 (1989). Given these considerations, case law interpreting section 111.50 and counterpart in the Illinois Business Corporation Act should apply to the waiver provisions of the merger statute and the articles of merger. That case law squarely opposes Eleventh Amendment immunity for Respondent.

4. WHETHER OR NOT GRANTING OF CERTIORARI WOULD ENTAIL ANALYSIS OF NEW ISSUES IS IRRELEVANT TO THIS PETITION.

Respondent tries to shy the Court away

from a granting certiorari with the spectra of issues raised, but not addressed in the Court of Appeals. It claims that an appeal in this Court would necessitate consideration of whether the Athletic Association was a state actor for Fourteenth Amendment purposes, and if indicia of state action for purposes of the Eleventh Amendment are the same.

Whatever additional defenses Respondent might raise have no bearing on the suitability of the issue of Eleventh Amendment retroactively for Supreme Court review. If the Athletic Association's actions fell within Eleventh Amendment protection before the merger, the Court of Appeals should have decided Respondent's appeal on this basis. Instead it ventured into uncharted waters, wrongly deciding the Eleventh Amendment retroactivity question.

If the law is unsettled as to the

availability of Eleventh Amendment immunity to respondent Athletic Association before the merger, this case could present another question worthy of Supreme Court hearing. If the law is settled, it can be applied on remand. A holding, however, so specious and far-reaching as the Court of Appeals' decision should not stand.

CONCLUSION

For the reasons contained herein, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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